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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND EUGENE BOYKINS,

Defendant and Appellant.

B154960

(Super. Ct. No. BA189367)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob S. Bowers, Judge. Affirmed.

Nancy Mazza for, Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and David A. Voet, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Raymond Boykins challenges his attempted murder conviction on sufficiency of evidence and jury coercion grounds. We conclude the victim's out-of-court identification of appellant constituted substantial evidence supporting the conviction, despite the victim's repudiation of the identification at trial. We further conclude that the court's response to the jury's declaration of deadlock did not coerce the verdict.

BACKGROUND AND PROCEDURAL HISTORY

On July 9, 1998, Tim Clark and Julius Miller were fatally shot. James Green identified appellant as the gunman. Green and the victims were members of a Crips gang, whereas appellant belonged to a rival Bloods gang.

On July 17, 1998, someone fired at least three shots at Dashon Jackson's car. Jackson was also a member or associate of the Crips gang and was Clark's close friend. When interviewed by Detective Gregory McKnight, Jackson identified appellant as the person who shot at him.

The jury acquitted appellant of murder but convicted him of attempted murder. It found the crime was willful, deliberate, and premeditated, and found the personal firearm use and criminal street gang enhancement allegations true. The trial court sentenced appellant to 50 years to life in prison.

DISCUSSION

1. Sufficient evidence supports appellant's conviction.

At the time of trial, Jackson was serving a prison term for bank robbery. He testified the shooting incident occurred while he was stopped along a curb to avoid police officers patrolling in the area. He had been drinking liquor and did not want to be stopped by the police. As he waited for the police to leave the area, two men in a car turned the corner and drove toward his car. Jackson's passenger told him the passenger in the other car was talking and pointing at them. The passenger in the other car then leaned across the driver and began shooting at Jackson. Three bullets struck Jackson's

car as Jackson drove away. Jackson denied that appellant was the person who shot at him and testified he did not get a good look at the gunman. He did not report the incident to the police because he was accustomed to such incidents.

Jackson further testified that McKnight brought up the July 17, 1998, incident when McKnight interviewed him in jail a year later. Jackson admitted he truthfully told McKnight that he got a good look at the gunman. He also admitted that he selected, circled, and signed appellant's photo in one of seven six-packs McKnight showed him. He even admitted saying he was positive about his identification, but claimed he was only identifying appellant as someone he knew, not as the person who shot at him. Jackson testified he was familiar with appellant because they went to school and grew up together and he had seen appellant around the area. Jackson admitted, however, that he knew many of the individuals included in the six-packs, but he only circled appellant's photo. McKnight wrote out Jackson's statement, and Jackson admitted he reviewed and signed it. He acknowledged that everything in the written statement was true except the identification of appellant as the person who shot at him.

McKnight testified he interviewed Jackson in conjunction with the Clark and Miller murders and did not know about the July 17, 1998 shooting. McKnight showed Jackson the seven six-packs he had prepared regarding the murders and Jackson pointed out photographs of several people he knew. However, he identified the photograph of appellant as the person who shot at him. Jackson said he got a good look at the gunman and was positive it was appellant. McKnight filled out a statement form, which Jackson reviewed and signed.

McKnight searched Jackson's car and recovered a bullet from the door. Ballistics testing established it was fired from the same gun as the bullets recovered from the bodies of Clark and Miller.

Detective Gerald Ballesteros testified gang members who "snitched" by helping the police solve crimes or testifying against a fellow or rival gang member risked retaliation by other gang members, including the infliction of injury or death. The danger

extended to any prison inmate labeled as a snitch.

Jackson denied being concerned about being labeled as a snitch, but admitted he wanted nothing to do with the case against appellant. When he testified at the preliminary hearing that he did not report the shooting incident because “that’s a gang on me and there’s penalties to it,” he was referring to his own personal principles, which include “not even dealing with the police.”

Appellant contends the evidence was insufficient to support his conviction because Jackson repudiated his out-of-court identification of appellant, the identification was insufficiently reliable, and no other evidence linked him to the crime.

To resolve this issue, the entire record is reviewed in the light most favorable to the judgment to determine whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) An out-of-court identification is sufficient to support a conviction, even if the witness is unable to positively identify the defendant at trial. (*People v. Cuevas* (1995) 12 Cal.4th 252, 257, 272.) The trier of fact confronted with an out-of-court identification repudiated at trial must decide whether to believe the identification or the in-court repudiation of that identification. In doing so, the trier of fact may consider factors such as the witness’s prior familiarity with the defendant, the opportunity and ability to observe the defendant during the commission of the crime, the motive to falsely implicate the defendant, and the level of detail given in the identification and any accompanying description of the crime. (*Id.* at p. 267.) The trier of fact may also consider the possible reasons for the repudiation of the identification, including the witness’s fear of retaliation or explanation for making a false or erroneous identification. (*Id.* at pp. 267-268.)

The jury found Jackson’s out-of-court identification more credible than his in-court repudiation of that identification. Several factors mentioned by the Supreme Court in *People v. Cuevas, supra*, 12 Cal.4th at pages 267-268, support the jury’s choice. Jackson testified he had grown up with appellant, attended school with him, and observed

him around the area. Because he recognized appellant in the courtroom, it is reasonable to conclude his familiarity with appellant would have enabled him to recognize appellant at the time of the shooting. Despite some equivocation, Jackson ultimately admitted at trial that he got a good look at the person who shot at him. The relatively brief duration of the encounter, Jackson's testimony he had consumed alcohol, and the lighting and distance between Jackson and the gunman were factors for the jury to consider in assessing the credibility of the out-of-court identification. Those factors, however, did not render the identification physically impossible or obviously false. (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) Jackson's ability to describe the car, the gun, and the gunman's posture lent credence to his prior identification by establishing that he had a sufficient opportunity to observe the car and the gunman and that his ability to perceive was not impaired by lighting, distance, or alcohol.

The evidence presented the jury with a number of reasons to disbelieve Jackson's repudiation of his identification at trial. While Jackson admitted identifying appellant, his explanation that he merely identified appellant as someone familiar was implausible. When he was shown the photographic lineups, Jackson readily acknowledged knowing a number of individuals depicted in the photographs including appellant. Despite that familiarity, Jackson failed to circle any photograph other than appellant's. Further, Jackson's explanation that he did not see his signed statement identifying appellant by reference to the photographs was implausible. He admitted he reviewed the statement written for him by McKnight before he signed it, and the statement included an identification of appellant by reference to the photographic lineup. Jackson's explanation that he did not see that part of the statement, even though it appeared immediately above his signature, contradicted his earlier admission that he reviewed the statement. Finally, gang members are reluctant to testify against other gang members. The prosecution's evidence of gang retaliation against "snitches" provided a logical and compelling explanation for Jackson's repudiation. Jackson's explanation at the preliminary hearing for failing to report the incident to the police effectively confirmed his fear of gang

“penalties.” He further illustrated his desire to avoid testifying against gang members by refusing to state the names of his companions, despite the absence of any facts implicating them in wrongdoing.

On this basis, the jury could have believed Jackson’s out-of-court identification of appellant and rejected his repudiation of that identification at trial. Accordingly, the record contains substantial evidence to support appellant’s conviction.

2. The trial court did not coerce the jury’s verdict.

The jury was instructed on September 13, 2001, but did not begin deliberations until the morning of September 14. It deliberated for four and one-half hours before requesting readback of certain testimony. The jury received the requested testimony the next day and resumed deliberations for a mere 53 minutes.

After deliberating for two hours and nine minutes the next court day, September 18, the jury wrote a note stating it was at an impasse and needed the court’s assistance. When the jury was brought into the courtroom, the foreperson explained, “It’s the—how much weight the statements carry, and what do we do to go beyond that.” The foreperson later explained the jury did not understand how to deal with conflicting testimony and out-of-court statements made by the same witness. In addition, the jury wanted to know “where do we go when we are absolutely stuck on something, where we have reached a wall.” In reference to the second point, the court told the jury to review the evidence and instructions. The foreperson explained the jury had “hit walls” on all three counts and was concerned about evidence it did not have. The court told the jury it must not speculate about other evidence that might exist or why it was not introduced. The court re-read CALJIC No. 1.03, which instructs the jury to decide all questions of fact only from evidence received at trial, and CALJIC No. 2.11, which instructs that neither side was required to call all possible witnesses. The court also re-read CALJIC No. 2.13, regarding prior consistent or inconsistent statements, and explained that the jurors were to decide whether they believed what the person said while testifying in court or what he purportedly said in a prior statement. The court reminded the jury that in

deciding whether to believe the testimony or conflicting prior statement, the jury could consider the witness's demeanor while testifying and the circumstances under which the prior statement was made. The foreperson stated the court had addressed the issues the jury raised in its note.

The jury resumed deliberations. However, after one hour and seven minutes, it wrote another note declaring itself "greatly divided" and unable to reach a verdict on any count. In answer to the court's inquiry, the foreperson stated the jury had voted eight times on each count, and was split five and seven on the murder counts and nine and three on the attempted murder count. Without consulting counsel, the court told the jury,

"What I am going to do is read to you another instruction. [¶] When I finish reading that instruction I'm going to dismiss you for the day. I'm going to ask you to think about this instruction. I want you to come back tomorrow at your usual time, and I would like for you to resume your deliberations.

"Clearly, if there is a problem or resolution cannot be achieved, you will let me know that. But I want to do this and we're obligated I believe to do this. . . .

"Although the verdict to which a juror agrees must of course be his or her own verdict, the result of his or her own conviction and not a mere acquiescence in the conclusion of his or her fellow jurors, yet an [sic] order to bring one's mind to a unanimous result, you must examine the question submitted to you with candor and with the proper regard and deference to the opinions of each other.

"Remember that you are not partisans or advocates in this matter, you are impartial judges of the facts. Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. [¶] Each must decide the case for yourself but should do so only after discussing the evidence and instructions with the other jurors. [¶] With this view, it is your duty to decide the case if you can conscientiously do so. In conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments.

"Hopefully that will give you some insight or some guidance into what it is that you are trying to achieve.

"I would like to also say at this point clearly I recognize the effort and energy that are you [sic] putting into this and at this point there is nothing wrong with you, there is nobody angry at you. There's no problem whatsoever. These are very serious issues which you are being asked to decide. But I'm sorry that the court and the attorneys can't give you more

guidance. But basically under the law that's all we can say to you at this point. . . .

“Again, if it turns out that everything is set in stone, so to speak—and I hope it isn't—but if it is you will have done the best you could do. [¶] So with that in mind thank you very much.”

The following day, after 4 hours and 19 minutes of deliberations, the jury announced it had reached verdicts on all counts.

Appellant contends the trial court erred in failing to discharge the jury after it twice declared itself deadlocked.

Penal Code section 1140 precludes the trial court discharging the jury without a verdict unless both parties consent or, after the expiration of such time as the court deems proper, it appears to the satisfaction of the court there is no reasonable probability the jury can agree. The court has great discretion in making this determination, but it must not say or do anything to coerce the jury into reaching a verdict. (*People v. Sheldon* (1989) 48 Cal.3d 935, 959.)

While the jury's reference to an impasse in its first vote may have suggested the jury was deadlocked, the foreperson's explanation in court negated this inference. The jury had not then reached a verdict on any count. Moreover, the foreperson did not declare they were unable to agree, but simply that they were confused and needed the court's guidance on matters such as conflicting statements by a single witness and matters the jury felt should have been, but were not introduced in evidence. At that point, there was no basis for concluding the jury would not be able to reach a verdict. It would have been error to discharge the jury at that point.

The jury's second vote was therefore the first declaration of deadlock. At that time, the jury had deliberated a total of 8 hours and 39 minutes over the course of three days. The court permissibly inquired about the jury's numerical division as to each count, but did not ascertain whether the majority favored conviction or acquittal as to any count. (*People v. Proctor* (1992) 4 Cal.4th 499, 538.) Although the jury had voted eight times and the numerical split indicated it was not close to reaching a verdict on the

murder counts, the court acted well within its discretion in concluding that it was reasonably probable the jury could reach a verdict on at least count three.

The court carefully avoided telling the jury it must reach a verdict or suggesting that any adverse consequences would flow from its failure to do so. The court instead repeatedly conceded the possibility the jury would be unable to reach a verdict, but told the jurors it felt obligated to give them one more instruction and to ask them to resume deliberations the next morning. Neither the instruction given nor the circumstances under which it was given were coercive. The instruction given was virtually identical to one approved in *People v. Gill* (1997) 60 Cal.App.4th 743, 747-748. It did not suggest that any jurors should relinquish their own opinions or defer to other jurors' opinions. Instead, it suggested jurors should listen to one another with proper respect and deference for opinions of others, and reminded them that any verdict reached must result from each juror's own decision, not from mere acquiescence in the conclusion reached by other jurors. The instruction had no tendency to exert pressure on jurors to reach a unanimous verdict. After reading this instruction, the court acknowledged the difficulty of the jury's task and the jurors' efforts during deliberations. The court told the jury that if it could not reach a verdict, it would nonetheless have done its best. The court instructed the jury late in the afternoon and dismissed it at approximately the same time it had each day of the trial.¹ Thus, the jury was not, as appellant argues, effectively informed "it was their duty to reach a verdict and they had better do so, however it can be done."

Appellant also argues his acquittal on the murder charges show the jury reached a compromise verdict. However, the murder and attempted murder counts were based on separate incidents and evidence. Although Green and Jackson retracted their out-of-court identifications at trial, the defense introduced evidence regarding distance and lighting that cast additional doubt upon the accuracy of Green's out-of-court identification. Furthermore, appellant may not rely upon the favorable verdict he received on the murder charges to attempt to invalidate the verdict on the attempted murder count. (Pen. Code, §

954; *People v. York* (1992) 11 Cal.App.4th 1506, 1510.)

DISPOSITION

The judgment is affirmed.

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BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.

¹ The court received the note at 3:15 p.m.; it addressed the jury at 4:10 p.m.